STATE OF MICHIGAN

COURT OF APPEALS

DEUTSCHE BANK NATIONAL TRUST COMPANY, Plaintiff-Appellee, v CONSTRUCTION LOAN ONE, L.L.C., Defendant-Appellant.	UNPUBLISHED March 20, 2012 No. 302601 Washtenaw Circuit Court LC No. 10-000452-CH

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

In this mortgage priority dispute, defendant appeals as of right from the trial court's order granting summary disposition in plaintiff's favor. We affirm.

On May 31, 2006, Jason and Barbara Hilberer (the borrowers) obtained a construction loan from defendant. The loan was secured by a $50,000 future advance mortgage (first construction mortgage) on a parcel of property commonly known as 5584 Vaughn Road. The mortgage was recorded June 6, 2006.

On December 1, 2006, the borrowers obtained a $500,000 loan from Accredited Home Lenders, Inc. The loan was also secured by a mortgage (Accredited mortgage) on the Vaughn Road property. Shortly before Accredited and the borrowers executed the loan, defendant and Accredited entered into a subordination agreement whereby defendant agreed to subordinate its first construction mortgage to the Accredited mortgage. Both the Accredited mortgage and the subordination agreement were recorded on April 20, 2007; however, the borrowers paid off the first construction mortgage on January 29, 2007, according to plaintiff's complaint, before the subordination agreement was even recorded.

Just days before the Accredited mortgage and subordination agreement were recorded, on April 11, 2007, the borrowers obtained a second construction loan from defendant, secured by a $50,000 mortgage (second construction mortgage) on the Vaughn Road property. Given the timing of the second construction mortgage, a title commitment prepared in conjunction with the loan failed to disclose the Accredited mortgage. However, in their loan application, signed April 11, 2007, the borrowers listed a monthly expense of $3,198 under "First Mortgage (P&I)." Additionally, under the assets and liabilities section, the borrowers listed the Vaughn Road property, stating that it had a value of $680,000, a mortgage and lien in the amount of $500,000,

and mortgage payments in the amount of $3,198. Also, a credit report prepared on March 9, 2007, revealed a 360-month conventional remortgage held by "ACCRED HOME" in the amount of $500,000, with a balance owing of $499,822. The second construction mortgage was recorded on April 13, 2007.

In late 2008, the borrowers defaulted on the Accredited loan. Accredited initiated foreclosure proceedings and subsequently purchased the Vaughn Road property in the foreclosure sale. However, Accredited later cancelled the foreclosure sale because the borrowers had "entered into a loan modification agreement with [it] prior to the foreclosure sale, and the mortgage foreclosure was supposed to be cancelled." Thereafter, defendant recorded an affidavit of interest in the Vaughn Road property. The affidavit identified the second construction mortgage and asserted that it "remains in effect and is prior to the interest of Accredited Home Lenders, Inc., or its assignee or transferee."

On December 23, 2009, the Accredited mortgage was assigned to plaintiff. The borrowers subsequently defaulted on the Accredited loan and foreclosure proceedings were again commenced on the Vaughn Road property. A foreclosure sale was held in February of 2010 and plaintiff purchased the property for $595,382.70. Three months later plaintiff filed a complaint to quiet title and for declaratory relief, seeking to have the second construction mortgage declared subordinate to the Accredited mortgage.

After conducting discovery, plaintiff sought summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argued that the Accredited mortgage had priority because defendant had actual and constructive notice of it prior to executing and recording the second construction mortgage. Defendant denied plaintiff's claim of notice and further argued that plaintiff violated the terms of the subordination agreement by failing to give defendant notice prior to initiating foreclosure proceedings. Therefore, defendant argued, the subordination agreement was void. The trial court agreed with plaintiff, concluding that defendant had both actual and constructive notice of the Accredited mortgage before defendant executed and recorded the second construction mortgage. Therefore, the court held, the Accredited mortgage had priority and, because foreclosure of the Accredited mortgage extinguished the second construction mortgage, defendant had no further interest in the property. Accordingly, an order granting plaintiff's motion for summary disposition was entered and this appeal followed.

Defendant argues that the trial court erroneously granted plaintiff's motion for summary disposition because: (1) the court ignored the notice requirement contained in the subordination agreement, (2) defendant did not have actual or constructive notice of the Accredited mortgage, and (3) discovery was incomplete. After de novo review of the trial court's decision on plaintiff's motion, we disagree. See *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

First, we consider and reject defendant's claim that summary disposition was premature because discovery was incomplete. It appears uncontested that, as set forth in the court's scheduling order, the discovery period ended two months before plaintiff filed its motion for summary disposition. Further, defendant conceded in its brief in opposition to plaintiff's motion for summary disposition that, "[e]ssentially, there are no factual disputes." Defendant cannot take a contrary position on appeal. See *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008). And, finally, defendant failed to raise this argument below and we will not

consider an issue raised for the first time on appeal. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008).

Second, we consider and reject defendant's argument that the trial court ignored the notice requirement contained in the subordination agreement. The subordination agreement only addressed the first construction mortgage which the borrowers paid off in full in January of 2007—before the agreement was even recorded. This is a priority dispute involving the second construction loan and the Accredited mortgage; thus, the subordination agreement is irrelevant to the determination of this dispute. In its response to plaintiff's motion for summary disposition, defendant even admitted that the subordination agreement was irrelevant, stating: "[t]here is no reason to apply an earlier, unrelated subordination agreement to 'Second' Mortgage."

Third, we consider and reject defendant's challenge to the court's conclusion that defendant had the requisite notice of the Accredited mortgage. Michigan is a race-notice state with regard to determining interests in real property. That is, MCL 565.29 provides:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

Defendant recorded its second construction mortgage before the Accredited mortgage was recorded. Generally, a mortgagee that first records its mortgage has priority over a prior unrecorded interest. *Richards v Tibaldi*, 272 Mich App 522, 540; 726 NW2d 770 (2006). However, to be entitled to the protections of MCL 565.29, one must be a "purchaser in good faith." "A good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). "Notice" of a defect depriving a purchaser of good faith may be either actual or constructive. *Richards*, 272 Mich App at 539.

Here, we agree with the trial court that defendant had actual notice of the Accredited mortgage prior to executing and recording the second construction mortgage. When the borrowers applied for the second construction loan, they referenced in their loan application a first mortgage on the Vaughn Road property in the amount of $500,000. They also listed a monthly expense of $3,198 under "First Mortgage (P&I)." Defendant's president testified in his deposition that he asked the borrowers about the $3,198 mortgage payment listed in their loan application and he was advised that it was the monthly mortgage payment on the property. Defendant's president admitted that the loan was approved as a second mortgage, and the subordination agreement drafted as part of the loan process specifically referenced the Accredited mortgage. Further, a credit report generated in conjunction with the construction loan also identified a $500,000 mortgage held by "ACCRED HOME." In light of these facts, the trial court correctly concluded that defendant had actual notice of the Accredited mortgage. And, in any case, even if defendant did not have actual notice, defendant clearly had constructive notice of the Accredited mortgage. That is, defendant had "knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate." *Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951). Accordingly, defendant was not a "purchaser in good faith" and was not entitled to the

protections afforded by MCL 565.29. Therefore, plaintiff's motion for summary disposition was properly granted.

Affirmed. Pursuant to MCR 7.219(A), plaintiff is entitled to costs as the prevailing party.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Henry William Saad